CRIMINAL PROCEDURE IN SCOTLAND.[55½]

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TRIAL (SECOND DIET) [56]

Preliminary Matters.

The trial of the accused is either in the sheriff court or the High Court of Justiciary, depending upon the seriousness of the charge. The procedure in each court is practically the same.

In the High Court, if the accused fails to appear for trial, the prosecutor being present, sentence of fugitation or outlawry is passed against the accused. The effect of this sentence is thus stated by Hume: "He cannot bear testimony on any occasion or hold any place of trust, or even pursue or defend in any process, civil or criminal, or claim any personal privilege or benefit whatsoever of the law."[57] His personal property also escheats to the Crown. In the Monson case (1893) one of the accused persons, Scott, who failed to appear for trial, was outlawed.

[55½] Concluded from January number.

[56] Following is a schedule of the proceedings prior to the trial, compiled by Messrs. Renton and Brown in their book on criminal procedure:

Monday, June 7—Petition and warrant to arrest issued.

Tuesday, June 8—Declaration (if desired by accused) and committal for further examination.

Wednesday, June 16—Committal for trial. (Should as a general rule be within eight days from declaration).

Monday, June 21—Case reported to Crown Office. (No fixed period for this, but should be as early as possible after committal for trial).

Monday, June 28—Indictment drafted by Crown Counsel.

Friday, July 2—Proof print sent to procurator-fiscal for revisal.

Monday, July 5—Proof print returned revised.

Friday, July 9—Warrant of citation issued by Clerk of Justiciary.

Monday, July 12—Indictment served. List of jury (not less than thirty) prepared under directions of Clerk of Justiciary. Indictment and documentary productions lodged with Sheriff Clerk of court of first diet.

Monday, July 19—First diet (six clear days after service). Any objections to relevancy, etc., to be stated and minute signed by Clerk stating that such objections sustained or repelled. Any special defense tendered and recorded. Plea of not guilty recorded and signed by Sheriff.

Friday, July 23—Last day (five clear days before trial) for notice to Crown Agent of challenge of previous convictions.

Saturday, July 24—Last day (four clear days before trial) for notice to Crown Agent of inability to find any person or witness mentioned in indictment. Last day (three clear days before trial, allowing for Sunday intervening) for notice to Crown Agent of witnesses and productions for defense. Copies of all written notices to be lodged with Clerk of Justiciary for use of court.

Thursday, July 29—Second diet. Trial.

[57] Vol. II, p. 270.

When a case is called for trial in either court the accused may present, for the purpose of securing an adjournment, objections in respect of the misnomer or misdescription of any person named in the indictment or of any witness in the list of witnesses, provided he has given notice, four days before the trial, to the prosecutor of his inability to discover who such person named in the indictment is, or to find such witness, and has not been furnished by the prosecutor with such additional information as might enable him to ascertain who such person is, or to find such witness in sufficient time to precognosce him before the trial.[58] If either of these facts is shown the court will probably order an adjournment.

The High Court, when the trial is before that court, may review the proceedings at the first or pleading diet, and if it is shown that the accused pleaded guilty to an incompetent charge, or under circumstances which tended to prejudice him, the court may allow the plea to be withdrawn or modified and will grant an adjournment.[59] Sometimes the trial judge of his own initiative will point out a defect in the indictment.[60]

If the prosecutor is not prepared for trial, because a material witness is absent or for some other reason, he may at any time before the jury is sworn to move to desert the diet *pro loco et tempore.* The granting of this motion is in the discretion of the court. If granted, a later date is set for the trial.

If the accused pleaded not guilty at the first diet he may change this at the trial to guilty. An entry to this effect is made in the record, and signed by the accused and the judge.

Impanelling the Jury.

The jury is composed of fifteen jurors, five special and ten common. The names of those who have been summoned for jury service are placed in two glass jars, one for the special, the other for the common jurors. The clerk draws at random the names from the two jars. If a juror when called fails to answer, he is fined by the court. A person qualified as a juror seldom attempts to escape jury service. About the only excuse that is accepted is illness, and a medical certificate is required.

The prosecutor and the accused may each peremptorily challenge five jurors, not more than two of whom are special jurors. The challenge

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[58]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 53.
[59]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 41.
[60]See Coutts, 1899, 3 Adam 50.

must be made when the juror is drawn. Each party has an unlimited number of challenges for cause. It is, however, very unusual for the prosecutor to challenge a juror. There is no *voir dire* examination. If the challenge is based upon the lack of sufficient qualification, this can be proved only by the oath of the juror objected to. Challenges of both kinds are very rare. The writer observed a challenge in but one case, when two jurors were peremptorily challenged by the defense. The juries in all cases seemed to be composed of intelligent men, impressed with the seriousness of their position.

After the jury is selected the clerk reads to them the charge against the prisoner, omitting any reference to previous convictions. The jury is then sworn as follows: "You fifteen swear by Almighty God, and as you shall answer to God at the great Day of Judgment, that you will truth say and no truth conceal, in so far as you are to pass on this assize." This oath is a survival from the time when the jury based their verdict upon their own knowledge of the facts.[61] After the jury is sworn no adjournment can be granted. The last step before the examination of witnesses is the reading to the jury of any special defenses, notice of which has been given.

Examination of Witnesses.

One of the characteristic features of Scottish procedure is the absence of an address to the jury by the prosecutor before evidence is introduced. The Lord Justice Clerk (Kingsburgh) in the Monson trial spoke of this as a humane provision. The judge and jury obtain their first knowledge of the case against the accused from the testimony of the witnesses for, in addition to the above fact, there has been, as already stated, no preliminary public examination for the newspapers to report. No witnesses are examined on oath till the trial.

The oath, which is administered to the witness by the judge, is as follows: "I swear by Almighty God, as I shall answer to God, that I will tell the truth, the whole truth and nothing but the truth." Young children are not sworn; the judge simply tells them to speak the truth. With the exception of medical witnesses, who are to give opinion evidence, all the witnesses in a case except the one under examination are compelled to leave the court.

The examination of the witnesses is based upon their precognitions. If the trial is in the sheriff court, the procurator-fiscal, who prosecutes,

[61] "Assizers may in our Law judge according to their privat knowledge; without Lawful probation, which seems dangerous in Criminal cases." Mackenzie, p. 249.

has previously examined the witnesses privately and obtained their precognitions (statements by the witnesses of their knowledge of the facts). In the High Court the advocate-depute has the precognitions, which are sent to him by the local procurator-fiscal. In important cases the advocate-depute generally consults with the witnesses for the Crown before the trial.

It is a general rule in Scotland that an accused person shall not be convicted on the testimony of a single witness, no matter how credible. There must be also the testimony of a second witness or the testimony of the one must be corroborated by other facts or circumstances. Hume gives this example: "If one man swear that he saw the pannel stab the deceased, and others confirm his testimony with circumstances, such as the pannel's sudden flight from the spot, the blood on his clothes, the bloody instrument found in his possession, his confession on being taken or the like; certainly these are as good, nay better even than a second testimony to the act of stabbing."[62] In cases of circumstantial evidence it is not necessary that each point in the prosecution's case be proved by two witnesses. It is sufficient if a complete chain of evidence is established. All the evidence for the prosecution must be introduced before the defense calls its witnesses. After a witness for the prosecution has been cross-examined by the defense, he may then be re-examined by the prosecutor.

The prosecutor in examining witnesses is closely supervised by the court. If an improper question is asked, the court without objection made by the other side, may order the question withdrawn. Sometimes, counsel will agree in advance that certain questions, which might otherwise be objected to, shall be asked. In one case, observed by the writer, where the accused was charged with ten different acts of fire-raising, the advocate-depute before the trial said to counsel for the defense that if there was no objection he would ask his witnesses leading questions as to the facts of the burning. Counsel for the defense said he did not object, as he did not deny that the fires had occurred. As a result of this agreement the advocate-depute examined each of the persons whose property had been destroyed somewhat as follows: "Your name is John Baird, and you are a farmer in ..... parish. On the night of March 31st you retired about nine o'clock and an hour later were awakened by a cry of fire. You saw your barn was afire and you made efforts to extinguish the blaze, but were unsuccessful and the barn with the contents was totally

[62]Vol. II, p. 384.

destroyed, the loss being 100 pounds, covered by insurance." To this the witness replied, "yes." Ten witnesses were in this way examined as to the facts of each fire in about an hour. When it came to the question as to whether the fires had been started by the accused the advocate-depute asked direct questions of his witnesses.

As already stated, the prosecuting counsel is not permitted to examine any witness, not included in the list furnished to the accused. In a case in 1883 the sheriff before whom the case was being tried, after the close of the evidence on both sides, called and examined a witness not on the list. On appeal this was held improper.[63]

When a witness for the prosecution is being examined, it is not competent to ask him what he said in his precognition, nor can this be brought out on cross-examination, since the witness was not under oath when precognosced. Each side is entitled to precognosce the other's witnesses before the trial. This is possible because each is furnished with a list of the witnesses on the other side.

When the last witness for the prosecution has been examined, the declaration of the accused made before the examining magistrate may be introduced by the prosecutor. This is evidence against the accused but not in his favor. He can not have it read if the prosecutor objects. The declaration in most cases is unimportant as evidence, since the accused under the present practice generally does not make a declaration, unless it can be favorable to himself.

After the evidence for the prosecution is closed, counsel for the defense, without addressing the jury, calls his witnesses. In accordance with the Criminal Evidence Act of 1898, which applies both to England and Scotland, the accused person may take the stand in his own defense. There was much opposition in Scotland to the passage of this act in so far as it applied to that country. It was contended that the proposal was contrary to the principle that the prosecution must prove its case beyond a reasonable doubt, and that it would work hardship to the accused, particularly if innocent, since he would be subject to cross-examination if he testified, and the jury would as a practical matter draw a presumption of guilt if he failed to testify. In practice an accused person seldom takes the stand, and neither the judge nor the prosecutor may comment on this. If the accused does take the stand and presents a defense, which he has not disclosed in his declaration to the examining magistrate, this fact may be commented upon by the judge for the purpose of affecting his credibility as a witness.

[63]Wynn, 1883, 5 Coup. 370.

During the examination of the witnesses the judge takes full notes of their testimony. Several of the judges, by using shorthand, take down the evidence verbatim. These notes are used by the judge in summing up the evidence to the jury. The judge takes a very active part in the examination of witnesses. He not only controls counsel in their examinations, but also puts questions to the witnesses, and sometimes explains to the jury the answer of a witness. At times the judge will stop the examination of a witness by counsel and will conduct it himself. He is more likely to do this if the witness is a child. The judge always requires that counsel shall ask nothing but relevant and important questions, often demanding that counsel explain what he expects to bring out by a particular line of questioning. In several cases observed by the writer the judge asked the prosecuting counsel what he expected to prove by a certain witness, and on being told, called the opposing counsel to his desk and asked him if he intended to deny the truth of this. If counsel said no, the judge then said that there was no need to examine the witness further on this point, as he would instruct the jury that the matter was proved. In one case where the counsel for the Crown was examining a witness as to a certain matter, the judge told him not to proceed, unless he could prove by further witnesses a certain other matter, which was essential in order to make the first point of probative value. After a witness has been examined he cannot be recalled by either side without the permission of the judge, but not infrequently the judge will have a witness recalled in order that he may examine him further. The trial of a criminal case in Scotland is not a contest between opposing counsel, with the judge as referee, but an investigation, conducted in a simple and direct manner, into the truth of the facts material to the case. All the officials are very serious, and there is no levity such as is rather frequent in an English trial.

The jurors may take notes of the evidence and may ask questions of the witnesses. They are, however, generally instructed by the judge to postpone their questions till counsel completed his examination. In the Monson case the Lord Justice-Clerk instructed the jury not to discuss the evidence with each other until the end of the case.

If, at any time during the examination of the witnesses, the prosecutor sees that the charge against the accused cannot be established, he may, with the permission of the judge, withdraw the charge. In such a case the jury returns a formal verdict of not guilty.

At the close of the evidence for the defense both counsel may address the jury. Counsel for the defense has the last speech. This privilege,

along with the absence of a preliminary address to the jury by the prosecutor, is very advantageous to the accused.

The Judge's Charge to the Jury.

After both counsel have addressed the jury the judge charges the jury, both summing up the evidence and declaring the law applicable to the case. The function of the judge in charging the jury is well stated by the Lord Justice-Clerk in the Monson case:

"The purpose of such a charge as this is twofold. It is, in the first place, that the case may be, as it were, summed up to you from a legal point of view, so that you may understand the aspects of it, and how you ought to look at it; and, in the second place, that those features of it may be brought before you which are worthy of your consideration in a more unbiased and collected form than they can be in two controversial speeches addressed to the jury from the one side and the other. For, of course, it being the duty of a public prosecutor to state all that he can against the prisoner, he does so with the utmost of his ability. On the other hand, the counsel for the defense states his case with the utmost of his ability in the opposite direction; and it is not an unreasonable thing that at the conclusion of the case some words should be addressed to the jury from a more judicial and impartial point of view. I may tell you further that it is the practice of a judge to suggest to the jury things which occur to his own mind upon the evidence, and I shall certainly do so in the course of my observations; but I do it with this remark to you, that what I have to say as matter of observation is said not to dictate to you, but solely for your personal consideration. * * * One other thing the judge has to do, and that is to guide you in the matter of law, to guide you as to how the case must be looked at with respect to the way in which it has been presented by the Crown; and, of course, the law you will accept from me as solely responsible in that department."[64]

The judge in his charge generally resolves the case into the different questions involved and then lines up on both sides the evidence relative to each question.

The judge may express his opinion of a witness' credibility. In one case where the accused testified, the judge said to the jury that it was for them to decide whether they believed this testimony but that he would not be fair to them if he did not say that he himself was doubtful. In the same case, where there was a conflict between the testimony of

[64]J. W. More, The Trial of A. J. Monson, p. 438.

the accused and that of one of the prosecution's witnesses, the judge said it was for the jury to decide which one told the truth, but for himself he thought the witness for the prosecution was an excellent witness.

When an indictment is so drawn as to charge alternate offenses the judge may instruct the jury that the evidence will not justify conviction of one charge, and that their attention should be directed entirely to the other.

Verdict.

When the judge has charged the jury, they elect a chancellor, corresponding to our foreman. The jury may return their verdict at once, or if they wish, they may retire for deliberation.

There are three forms of verdicts—*guilty, not guilty* and *not proven.* Originally there were but two verdicts in Scotland, the forms being *fylit, culpable* or *convict,* and *clean* or *free.* These were the equivalent of guilty and not guilty. Towards the end of the 17th century a practice arose whereby the jury was confined simply to finding whether certain facts presented to them by the court were proved, the court determining the final question of guilt. The jury then returned a special verdict or found that the facts as presented to them by the court were proved or not proved. In this way the verdict of not proven arose, and continued the only form of acquittal till 1728 when the jury asserted their ancient privilege of bringing in a general verdict of not guilty. The verdict of not proven, however, continued in use. The effect of this verdict and its relation to not guilty will be discussed later.

A verdict may be reached by a majority vote. Each juror registers his personal view based upon the evidence, and there is seldom any effort by one juror to influence another. When a verdict of guilty is returned the chancellor states whether it is unanimous or by a majority, without indicating the exact vote. In one case where a majority verdict was returned, the judge asked the chancellor how the vote stood. The reply was 9 to 6 for conviction. The judge then said he would take the small majority into consideration in determining the sentence. This is an unusual practice. Ordinarily the judge does not know the vote, and even if it is known it does not affect the sentence. In most of the cases observed by the writer, where the accused was convicted, the verduct was unanimous. In two cases it was 9 to 6, and in several others it was 14 to 1. If the majority vote is in favor of the accused he need not stand another trial as in this country and in England, but is acquitted and discharged.

The majority verdict seems to work satisfactorily in Scotland, and

no opposition to it was encountered. The Lord Justice-Clerk when Lord Advocate in speaking of the majority verdict before the House of Commons said: "My experience which has now extended over a number of years, is that in capital cases it is barely possible, and I have never known an instance, for a man to be convicted by a bare majority. If the verdict of the jury in such a case should be eight to seven, I am perfectly satisfied that the sentence would not be carried into effect."[65] Dr. Cameron of Glasgow said on the same occasion: "We have in Scotland no necessity for unanimous verdicts. The existing Scottish system has worked so long and so well, that I cannot see what practical purpose is to be attained by changing it."[66]

In discussing the majority verdict with the Lord Justice-Clerk the writer suggested that the chief argument in this country against less than a unanimous verdict is the requirement whereby the prosecution must prove its case beyond a reasonable doubt, the vote of several jurors against conviction amounting to such doubt. The reply to this was that there is the same element of doubt in a case where it requires many hours for the jury to reach an agreement.

The majority verdict, of course, results in expedition. The deliberations of the jury are short, and no second trial can be required. Nor can there be a miscarriage of justice because of a stubborn or prejudiced juror. The majority verdict is in part responsible for the fact that jurors are seldom challenged.

The verdict of *not proven* is clearly anomalous and illogical, because the legal effect of this verdict is the same as not guilty. The accused cannot be tried again because he has "tholed his assize" (been in jeopardy). He is, however, stigmatized in the popular mind because the jury by their verdict have indicated that he is under suspicion, though his guilt cannot be established. Hume says: "Not uncommonly, the phrase *not proven* has been employed to mark a deficiency only of lawful evidence to convict the pannel; and that of *not guilty,* to convey the jury's opinion of his innocence of the charge."[67] This distinction is opposed to the principle that the guilt of the accused must be proved by the prosecution beyond a reasonable doubt, because it puts on the accused the burden of proving his innocence. In one case, observed by the writer, where the defense called no witnesses, counsel for the defense, in addressing the jury asked for a verdict of not proven. He said he could not ask for not guilty, as he had produced no witnesses to

[65] 316 Hansard, 1399.
[66] 316 Hansard, 1400.
[67] Vol. II, p. 440.

prove the innocence of the accused. In practice it would seem that not proven is often a compromise verdict. One of the High Court judges, writing in 1906, said: "The verdict would seem to be used by juries in order to relieve their consciences or preserve their self-respect, or perhaps as a convenient basis for compromise. They will not find a prisoner guilty, and they will not find not guilty; they will acquit him no doubt, but they place indelibly on record their view that in their opinion the innocence of the accused is extremely doubtful."[68]

In a case on circuit in June, 1912, the judge in charging the jury told them they might find the accused guilty or not guilty, and then added: "There remains, gentlemen, that last refuge of perplexed jurors, a verdict of not proven, against which I have a very strong opinion." It is needless to state that the jury did not return this verdict. Another of the High Court judges stated to the writer that he was strongly opposed to the not proven verdict. He said that a jury should be told a verdict of not guilty does not involve their personal belief in the innocence of the accused, but simply that the prosecution has not proved its case. There is general dissatisfaction with this verdict, but it is frequently returned. According to the judicial statistics for 1910, not proven was returned in more cases than not guilty.

Under the act of 1887 the jury may convict the accused of certain offenses not charged in the indictment. For instance, under an indictment for robbery, or for theft, or for breach of trust and embezzlement, or for falsehood, fraud and wilful imposition, the accused may be convicted of reset[69] (receiving stolen property), and under an indictment charging attempt, the accused may be convicted of such attempt although the evidence be sufficient to prove the completion of the crime said to have been attempted.[70]

The court has no power to interfere with or set aside the verdict of the jury, even though such verdict is contrary to the evidence.[71]

Sentence.

If a verdict of guilty is returned, the prosecutor moves for sentence. The court has no power to impose sentence without this motion, for the case still remains in the control of the prosecution, as representing

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[68]Lord Moncrieff in Blackwood's Magazine, 1906, p. 763.
[69]Crim. Proced. (Scotland) Act, 1887 (50 and 51 Vict. c. 35), s. 59.
[70]Sec. 61.
[71]"So that though they find *guilty* without any evidence, or *not guilty* against all evidence, nay though they find a verdict against their own knowledge both of the fact and the law; yet still, as their decision, is must and will stand unquestioned with the Court." Hume, Vol. II, p. 440.

the Lord Advocate. The prosecutor in moving for sentence may suggest the degree of punishment which he thinks the convicted person deserves. The judge is supplied with a list of any previous convictions and also with a list of the sentences imposed by other judges for similar offenses. The latter is for the purpose of securing uniformity of sentence. The judge may also examine witnesses as to the character of the convicted person.

When a sentence of death is imposed, the condemned person's movables are forfeited to the Crown.

Appeal.

Sheriff Court. The proceedings on indictment in the sheriff court are subject to a qualified review by the High Court. There are two methods for such review—*advocation* and *suspension.*

Advocation, which is employed by the prosecutor only, is the method of bringing before the High Court for review the judgment of the sheriff in dismissing an indictment. The proceeding is started by presenting to the High Court a bill of advocation, asking that court to recall the judgment of the sheriff, and to order him to proceed with the trial on the indictment. A single judge may pass the bill, but it requires a quorum of the court to decide whether the prayer of the bill shall be granted.

Suspension, which is available to the defense only, is the method for setting aside an improper warrant, or a defective judgment by the sheriff. It is commonly used where an indictment has wrongly been held competent, and the accused has been convicted, where the sheriff admitted improper evidence, or where the verdict does not correspond with the indictment. There can be no review on the merits of the case, nor on facts proved at the trial. The proceeding is started by a bill to the High Court as in the case of advocation. When the bill is presented the judge may order the accused to be liberated on bail. On the hearing of the bill the High Court has power—

(a) "To pass the bill and suspend the sentence *simpliciter,* and to order repayment of any fine, penalty, or expenses paid in terms of it; or

(b) "To repel the reasons of suspension, refuse the bill, and recommit the suspender to prison if necessary; or

(c) "To amend the conviction and sentence, and to remit to the inferior judge, when necessary, with instructions."[72]

High Court. There is no appeal of any kind from the judgment or sentence of a judge of the High Court in criminal cases. As all serious

[72]Renton and Brown, Criminal Procedure, 299.

offenses are triable only in this court, it results that persons receiving heavy sentences have no privilege of review. It was at one time the practice for a single judge of the High Court to refer questions of law arising in criminal cases to the full court, but this has not occurred since the passage of the act of 1887. The only relief for a wrongfully convicted person is through the Secretary for Scotland, who on behalf of the King exercises the pardoning power.

There is great difference of opinion in Scotland regarding the necessity for an appeal from the High Court. Even the judges of that court are not in agreement. One of these judges, who has been connected in different capacities with the administration of the criminal law since 1888, said he knew of no wrong conviction in all that time. On the other hand another judge in an address delivered in 1905, said: "The first and perhaps the most serious limitation of the jurisdiction of the Justiciary Appeal Court is that it can not control or review in any way the actings of any of its members sitting as single Judges. * * * He may, with perfect impunity, disregard the views of other Justiciary Judges; he may even disregard the law that has been laid down by a full Bench, or what is more probable, may avoid the appearance of doing so by misapplying it. None of the cases I have figured are at all fanciful. I could give instances of their having occurred in my own limited criminal practice."[73] A third judge said that in his opinion no appeal is necessary, as the Secretary for Scotland takes care of all cases of injustice. A contrary view is contained in an editorial published in the Juridical Review in 1889: "Little can be said for the appeal to the clemency of the Crown, except when seeking mitigation of sentence only. It is absurd and arbitrary. To pardon a convict for the crime which he did not commit, because he did not commit it, is neither reason nor redress. A political partisan, overburdened with his proper official work, is the judge. He conducts his examination by methods exactly opposite to those regulating the normal administration of justice. No publicity, no evidence on oath, no argument, but petitions, letters, untested theories of experts, perhaps electioneering considerations, out of which somehow emerges the haphazard decision to pardon."[74] Another writer in the same magazine says: "Another, and to many minds the most serious objection to the present system lies in the fact that it is spasmodic and irregular. For one thing, it is confined for the most part, to sentences of death and of penal servitude for long terms of years. There is a

[73]Lord Salvesen, The Justiciary Appeal Court, Its Anomalies and Limitations, 17 Juridical Review, 332, 334.
[74]1 Juridical Review, 385.

danger, too, of its being confined to the two or three sensational or picturesque cases which lay hold of the popular mind, and which on that very account are least likely to require attention."[75]

A writer in the Juridical Review in 1907 makes a strong argument for allowing appeals from the High Court. He says: "Do the juries who try High Court cases possess greater intelligence and experience in weighing evidence than the juries who are impanelled in the inferior courts? Are the judges of the High Court of Justiciary, who are also the judges of the Court of Session, liable to error when sitting in civil cases, and infallible when trying criminal cases?"[76] This argument is also applicable to cases tried in the sheriff court, for as already noted, there can be no review based upon the improper charge of the sheriff to the jury, or upon the merits of the case as determined by the verdict.

The establishment of a court of criminal appeal in England in 1907 caused considerable agitation for a similar court in Scotland. This agitation has been recently strengthened by the publication of Sir Arthur Conan Doyle's book dealing with the Oscar Slater case in 1904. Slater was convicted of murder on circumstantial evidence, which by some was considered inadequate, and was sentenced to death, but this was commuted to penal servitude for life. A writer in the Scottish Law Review for October, 1912, referring to this case, condemns the lack of appeal.

Summary Procedure.

The procedure in cases before an inferior judge, where there is no jury and where the proceedings are instituted by a complaint at the instance of the local prosecutor instead of an indictment in the name of the Lord Advocate as in solemn procedure, is regulated entirely by the act of 1908,[77] which repealed a number of other acts passed at different times and covering certain phases of the subject. Under these acts the procedure was highly technical and the results correspondingly unsatisfactory. The situation before 1908 was thus described by Lord Advocate Shaw before the House of Commons: "There has arisen in the course of years in Scotland a body of legal decisions on points of legal technique, the result of which has been to put a premium upon the ingenuity of the finder of flaws, and a real obstacle in the way of administration of justice by Summary Courts with any sense of security. The instances are numerous and one of them, which is at hand, I may cite. A prisoner

[75]A. D. Blacklock, A Court of Criminal Appeal for Scotland, 4 Juridical Review, 150, 161.

[76]A. J. L. Laing in 19 Juridical Review, 390.

[77]Summary Jurisdiction (Scotland) Act, (8 Edw. VII, c. 65).

was convicted of two separate offenses—a somewhat brutal assault and also a breach of the peace. He pleaded guilty to both, but because the clerk entered the conviction as of a 'crime' instead of the plural 'crimes' the court held that the conviction was bad, and the man, a criminal on two counts by his own confession, was on account of this slip sent home to his friends and his relations; a slip of grammar or the pen had let him loose upon society."[78] The act of 1908 by providing for the amendment of the complaint and for the correction of errors in the record, and by specifying the grounds and method of appeal has prevented the miscarriage of justice through technical objections.

It is not the purpose of the writer to present all the details of summary procedure, as these can be found by referring to the statute, but certain features may well be mentioned.

Summary proceedings are instituted by a complaint and are usually conducted by the public prosecutor. The statute provides, however, for prosecution by a private party, in which case any law agent may appear and conduct the prosecution.[79] Complaints at the instance of private prosecutors for offenses where imprisonment without the option of a fine may be imposed require the concurrence of the public prosecutor.

The accused is usually brought into court by a summons, though the judge has the power to issue a warrant for arrest when he deems this expedient. Where a person has been arrested for an offense which may be tried before any court of summary jurisdiction except the sheriff court the chief constable or other officer in charge of the police station may liberate the accused person till his trial upon receiving a deposit of cash or any article of the same value. If the accused does not appear for trial the pledge is forfeited. The magistrate may then issue a warrant for his apprehension, but in the police courts this is seldom done. It is a common practice for persons in the cities charged with minor offenses not to appear when their case is called and thus to allow their bail pledge to be forfeited. They accomplish this advantage, that a conviction cannot be recorded against them. As the deposit required is generally not much in excess of the fine that would be imposed upon conviction, there is a strong incentive not to appear for trial. In Glasgow, for instance, the usual deposit required in cases of drunkenness is 7s. 6d.[80]

When the case is called against the accused he may state any objections to the complaint, and no such objections can be made at a later

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[78]192 Parliamentary Debates (4th series), 101.

[79]Sec. 18.

[80]See testimony of Mr. Stevenson, chief constable of Glasgow, before the Royal Police Commission, 1907, p. 913.

time, except with leave of court on cause shown.[81] The court has power to amend the complaint at any time before the final determination of the case in accordance with the section of the statute noted on page 23 of this report. A large percentage of the persons charged with offenses in the courts of summary jurisdiction plead guilty.

After conviction or plea of guilty any judge of summary jurisdiction, except the sheriff, is given power to punish as follows:

(1) To award imprisonment with or without hard labour for any period not exceeding sixty days;

(2) To impose a fine not exceeding ten pounds;

(3) To ordain the accused (in lieu of or in addition to the said imprisonment or fine) to find caution for good behaviour for any period not exceeding six months and to an amount not exceeding twenty pounds;

(4) Failing payment of the said fine or on failure to find the said caution, to award imprisonment according to this scale: When the amount adjudged to be paid or for which caution is to be found does not exceed 5s, the period of imprisonment shall not exceed 5 days.

Exceeds—

5s, but does not exceed 1 pound.....Imprisonment 10 days
1 pound, but does not exceed 3 pounds.....Imprisonment 20 days
3 pounds, but does not exceed 5 pounds.....Imprisonment 30 days
5 pounds, but does not exceed 20 pounds...Imprisonment 60 days
20 pounds .....Imprisonment 3 months.[82]

He may also dismiss with an admonition. This is usually done in the case of first offenders. In sentencing, the magistrate often takes into consideration whether the guilty person has been in custody or liberated on bail.

The act of 1908 provides that where any person has been convicted and imprisoned as a result of any proceeding or judgment of a prosecutor or magistrate, which is malicious and without probable cause, and such proceeding or judgment has been quashed, the person injured thereby may bring an action for damages against the offending official.[83]

APPEAL IN SUMMARY CASES.

The method of review in summary cases provided by the act of 1908 is the stating of a case by the magistrate for the opinion of the High Court. Only questions of law can be reviewed, and either side may

[81]Sec. 29.
[82]Secs. 7 and 48.
[83]Sec. 59.

have a case stated.[84] The practice is for the clerk of the court, upon application made by the appellant, to prepare a draft of the case, setting forth the facts that have been proved, and the questions of law to be reviewed. A copy of this draft is then sent to each side and upon their agreement on the terms of the case, it is presented to the magistrate for his approval.[85] The stated case, along with a copy of the proceedings of the case, is then filed with the clerk of the High Court. The stated case should not contain a recital of the evidence, but should consist of a statement of the facts, which the magistrate has found to be proved. This involves the opinion of the magistrate as to the credibility of the witnesses. The stated case is unsatisfactory as a basis of appeal if insufficient or not clearly stated. The case is argued before the court, which may affirm, reverse, or amend the judgment of the inferior court.[86]

Where a case has been tried before the justices of the peace sitting at petty sessions there may be an appeal to the quarter sessions by either side on questions of law or fact. Since the act of 1908 most appeals from the justices on questions of law have been brought to the High Court by stated case.

GENERAL CONCLUSION.

The test of any system of criminal procedure is whether it produces satisfactory results, and inspires public confidence. The Scottish people have a very high opinion of their system and believe that on the whole it works satisfactorily. In speaking before the House of Commons in 1887 Dr. Cameron of Glasgow said: "He was as strongly impressed as any one could be with the general superiority of the principles on which the criminal law was administered in Scotland over those in England."[87] The Lord Justice-Clerk in 1898 wrote: "But the important thing in favour of the procedure is that it gives complete satisfaction to the public mind in Scotland, and results in as large a percentage of convictions as in any other part of the kingdom, if indeed it be not larger, while there is no substantial complaint of any kind either from the watchful citizen, who is ever ready to detect the executive in error, or from persons brought

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[84]Sec. 60. It is provided by section 75 that "no conviction, sentence, judgment, order of court, or other proceeding whatsoever under this Act shall be quashed for want of form, or, where the accused was represented by a law agent, shall be suspended or set aside in respect of any objections to the relevancy of the complaint, or to the want of specification therein, or to the competency or admission or rejection of evidence at the trial in the inferior court, unless such objections shall have been timeously stated at such trial by the law agent of the accused."

[85]Sec. 65.

[86]Sec. 72.

[87]316 Hansard, 1371.

to trial and their friends. After a long experience of criminal procedure in the case of serious crime in Scotland, I feel sure it may be said with truth that the public mind is at rest as regards the justice of what is done, and that those who are dealt with have no feeling that they have not been treated with a due regard to their rights to fair trial."[88] Another writer stated in 1901: "Our Scottish system of detection and prosecution is rapid and effective, giving little trouble to the individuals injured, and reasonably fair to the accused. There is no country where there are fewer unnecessary prosecutions, less hardship and vexation in the detection of crime, more guilty persons convicted, and fewer innocent persons condemned."[89]

Satisfactory results in the administration of the criminal law are not due alone to the system of procedure. General social and economic conditions must also be considered. In Scotland the problem of administration is not difficult. The country is in a well settled condition, and the number of commercial and industrial offenses, which always test a system of procedure hardest, are comparatively small. The great majority of the offenses are due to intemperance and do not involve difficult points of law. Apart from the character of the cases to be dealt with and the condition of the country the success of a system of procedure depends perhaps more upon its administration than upon the form of the system itself. The character and ability of the officials and their freedom from improper influences are determining factors. Freedom from influence is often a matter of development and such has been the case in Scotland. Up to the year 1734 Scottish judges were permitted to hold seats in Parliament. A Scottish historian, writing of conditions about the middle of the eighteenth century, says: "The authority of the bench was weakened not only by political bias, but by its close connection with, and its subserviency to, the landed aristocracy. * * * Their skill and dexterity as exponents of the law were much more frequently shown in finding specious theories to defend the opinion to which they were pledged than in steering a straight course to the goal of absolute justice."[90] Today the Scottish judge occupies an independent position, free from political and social influence.

In the case of the prosecuting officials the development has been away from political and other influences. Until recently some of the procurators-fiscal did not devote all of their time to their positions, but

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[88]J. H. A. Macdonald, Prisoners as Witnesses, 10 Juridical Review, 129, 134.
[89]Chas. J. Guthrie (now Lord Guthrie) in 13 Juridical Review, 133, 144.
[90]Sir Henry Craik, A Century of Scottish History, 245.

also acted as the law agents of landed proprietors.[91] Their appointment was formerly a political one, but the present Lord Advocate recently announced in the House of Commons his intention of filling vacancies by promoting those of lower rank. The appointments of the Lord Advocate and the advocates-depute still depend in part upon party affiliation, and they go out of office upon the defeat of their party. The Lord Advocate is always a member of Parliament, and the advocates-depute may hold seats there. There is at present some agitation for the permanent appointment of the advocates-depute, and for depriving them of the right to participate in political matters.

The only points of procedure to which there seems to be any opposition are the verdict of "not proven" and the lack of an appeal from the High Court.

The question now arises whether the Scottish system as a whole can be recommended for adoption in this country. To this the answer is no. This system developed to fit the local conditions,[92] and must be considered along with the manner of its administration. One of the members of the German commission that investigated the criminal procedure of England and Scotland in 1907 said in his report: "Certainly we should not copy Great Britain, for very few of its institutions are directly transferrable."[93]

Is there any particular point of Scottish procedure that could be adopted to advantage in this country? This is a difficult question to answer, for each feature of a system is related to all the others. In most countries criminal procedure has developed by various readjustments of the balance between the provisions favorable to the prosecution and those favorable to the accused. If at a particular time the public, often influenced by the outcome of a sensational case, comes to feel that either side has too great an advantage, a change is made in the procedure to off-

[91]Dr. Cameron of Glasgow before the House of Commons in 1887, 316 Hansard, 1372.

[92]"The truth seems to be, that there are in every case very great obstacles to the transferring of the Criminal Law of any one nation to another. Because, in any country, the frame and character of this part of its laws has always a much closer dependence on the peculiar circumstances of the people than the detail of its customs and regulations in most of the ordinary affairs of civil life. * * * The law respecting crimes has a near relation to the distinctions of rank among the people, the functions of their magistrates, their institutions and national objects, their manners and habits, their religion, their state of government and their position with respect to other powers." Hume, Commentaries, Vol. I, p. 16.

[93]Dr. W. Mannhardt, "Aus dem Englischen und Schottischen Rechtsleben, 55."

set this advantage by inserting a provision favorable to the other side. For instance, the granting of appeal in England was largely due to the popular feeling aroused by the notorious Beck case. Most of the changes made in the procedure in England and Scotland have been favorable to the accused.

In this country the feeling now is that the accused has too great an advantage, and various suggestions are being made to remedy this. One of these is that less than a unanimous verdict be required for conviction, a two-thirds or three-fourths verdict being advocated. Whether an intermediate position between a majority and a unanimous verdict is advantageous must be carefully considered. The selection of any fraction over a majority would seem to be largely arbitrary. Undoubtedly any reduction from the present requirement would lessen the number of "hung juries," and is therefore desirable, provided no injustice thereby results to the accused. On this point the experience in Scotland would seem to be of some help, for very few, if any, cases of injustice can be traced to the majority verdict. It must, however, be remembered that in Scotland throughout the various stages of procedure prior to the verdict, the accused has many advantages, in that no witnesses except those contained in the list furnished to him before the trial can be called, that counsel for the prosecution does not address the jury before introducing evidence, and that counsel for the defense has the last speech to the jury. In addition to this the prosecutor is not strongly partisan in presenting his case. In this country, however, the accused has the benefit of the *voir dire* examination, whereby he may examine the veniremen as to their feelings and prejudices, and exclude from the jury any who are unfavorably disposed toward him. In one respect a fractional verdict would result in no practical change from the present situation, since verdicts of guilty are sometimes returned where on the original vote the jurors were not unanimous for conviction. On the whole it would seem that a fractional verdict would not be unjust to the accused, and would result in the conviction of some guilty persons who would otherwise escape through disagreement. If, however, the accused is to be convicted on a fractional vote, he should be acquitted if the vote is to the same extent in his favor.

One of the most unsatisfactory features in connection with the administration of the criminal law in many states of this country is the reversal of judgments of conviction because of slight and immaterial defects in the indictment. There are two reasons for this situation. One is the archaic and highly technical form of indictment that is required in many of our states. The other is the lack of power on the part of the trial judge to allow amendment of the indictment. In both these re-

spects a lesson can be learned from Scotland. There the indictment is simple and direct and no words of art are required. In addition to this it is provided that objections to the indictment must be made before the trial of the facts, and the judges have liberal power of amendment. A statute such as that noted on page 23 of this report would remedy the existing evil here.

The administration of the Scottish system presents a number of features that might be advantageously followed in this country. Perhaps the most important of these is the independent position of the judge, who holds office for life, is paid an adequate salary, is free from political influence and newspaper pressure, and has the power to regulate the proceedings of the trial so that the issues are determined in simple and expeditious manner. This position, as has been already stated, was reached by a gradual development. There is some tendency along the same line in this country. Proposals are being made for lengthening the terms of judges; for electing them at other times than the regular political elections, and for increasing their powers at the trial. The administration of the law in Scotland surely teaches the value of an independent judiciary.

There is need for improvement in this country with respect to the position of the prosecutor and the capability of the men who hold this office. The term of service is everywhere short, and the office is a political one. Further than this, it is generally sought as a means of preferment along other lines. In the rural counties the prosecutor is generally a young man recently admitted to the bar, who expects his official record will win him clients, when he returns to private practice. In the metropolitan counties the prosecutor is often looking towards the gubernatorial chair, or to some other political position. In Scotland the prosecution of criminals is more of a profession. This is particularly true of the procurators-fiscal, who conduct the investigation of all criminal cases, and who prosecute in the sheriff courts. They receive what is practically a life appointment, and their preferment consists in being elevated to a more important post. The advocates-depute, however, go out of office with the party in power. It is highly desirable for us to take the office of public prosecutor out of politics, to lengthen the term, and to require special training in criminal law and procedure for the position. Many prosecutions fail because of the lack of skill on the part of the prosecutor. It would also be conducive to the better administration of justice if the strong partisan attitude of the prosecutor were lessened. Miscarriages of justice sometimes result through the eagerness of the prosecutor to secure a conviction. In some states prosecutors are compensated by fees,

the size of which depends upon whether the accused is convicted or acquitted. A fixed salary is preferable.

"Third degree" examinations by the police should be abolished. These are illegal, unfair to the prisoner, and often ineffective, since the sympathies of the jurors are aroused in favor of a person who has been subjected to such an examination. A provision, such as exists in Scotland, that an admission or confession made by an accused person in answer to the interrogations of the police shall not be admitted in evidence would go far to break up the "third degree."

It is very difficult to determine the exact results of the administration of the criminal law in this country because of the lack of adequate statistics. In Scotland there is published each year a complete report covering the number of apprehensions, the offenses charged, the result in each case, including the sentence, and the length of time in each case between committal and final determination. Such a report should be published annually in each state. It is unwise to propose sweeping reforms in our procedure without fuller information, than we now possess, of the results of the present system.[94]

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[94]The member of the German commission, already referred to, as a result of his study of the Scottish system makes the following recommendation in his report: "It would be well for us to consider, whether we cannot become a little freer of beaurocratic pedantry, whether we cannot confide more in the intelligence and independence of judgment of a suitably trained and elected staff of judges and prosecutors, and whether we cannot make our procedure somewhat freer and more natural." Dr. W. Mannhardt, "Aus dem Englischen und Schottischen Rechtsleben, p. 55."